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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 435

GRADY L. WEST and CLIFFORD C. GRAHAM,
Petitioners,

against

EDWARD M. GILBERT, E. L. BRUCE CO., INCORPORATED, CORALOC INDUSTRIES, INC., WILLIAM A. FIO RITO, ISRAEL G. SEEGER, and VINCENT D'SUSA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENTS E. L. BRUCE CO., INCORPORATED AND CORALOC INDUSTRIES INC., IN OPPOSITION

DONALD J. COHN,
Counsel for Respondents
E. L. Bruce Co., Incorporated
and Coraloc Industries, Inc.

THOMAS FIELD
PETER S. HELLER
Of Counsel

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Petitioners seek review of an order of the District Court denying their motion under Rule 60(b)(6) to vacate an order which dismissed the action for lack of prosecution, without prejudice, more than one year before the making of the motion to vacate.

We do not want to burden the Court with a repetition or elaboration of the reasons for the denial of the petition, advanced in the brief of the other respondents. It is clear that this is not an appropriate case for review by this Court.

Assuming for the sake of argument that the District Court had under Rule 60(b)(6) the power to entertain the motion made more than one year after the dismissal, notwithstanding that the grounds of the motion appear to fall within Rule 60(b)(1), as pointed out in the opinion of the Court of Appeals herein, a motion under Rule 60(b)(6) is addressed to the discretion of the Court.

Petitioners have failed to state any valid reason for the granting of review. There is no merit to the petitioners' contention that the decision below is in conflict with the decision of this Court in *Surowitz* v. *Hilton Hotels Corporation* 383 U. S. 363. The cases are totally dissimilar. The decision below is not in conflict with any decision in another circuit. No important question of law is involved.

All that would be accomplished by review here would be an adjudication whether in the view of this Court the District Court abused its discretion. Such determination would have little value as a precedent.

The history of the action set forth in the opinions below demonstrates that the case was within the area in which discretion could be exercised against reopening by reason of the laxity in prosecution. Beyond that, while petitioners devote over 30 pages of the petition to the merits of the action, it is demonstrable that their claim at least against Bruce and Coraloc is without merit.

Bruce was not involved in any dealings which Fio Rito and Seeger had with the plaintiffs prior to April 6, 1962.

On April 6, 1962, plaintiffs obtained $50,000 from Bruce for their Coraloc stock and options. Except for Bruce's intentions thereafter to revitalize Coraloc, these shares and options were unquestionably worthless. Upon Bruce's abandonment of these intentions, the Coraloc stock became permanently worthless.

Thus, ironically, the transaction complained of was a windfall to the plaintiffs in which they realized $50,000 for stock, which was worthless when they sold it and which has been worthless ever since.* Had Bruce not, as plaintiffs maintain, pressed them into selling their Coraloc stock, plaintiffs would remain the owners of worthless scraps of paper. Clearly, to say the least, plaintiffs have suffered no damage at the hands of Bruce.

Indeed, following the commencement of the action, plaintiffs' counsel, Mr. Wels, stated to us that he considered Bruce an innocent victim and offered to discontinue the action against Bruce (82a).** The discontinuance of the action against Bruce was not carried out because of procedural difficulty.*** Thus the dismissal below had the effect of carrying out plaintiffs' counsel's 1962 offer to discontinue the action against the corporate defendants.

In light of the foregoing, putting to one side the prejudice resulting to defendants from inability to cross-examine at the trial plaintiffs' witness who died while this action was dormant, denial of reinstatement of the action against the corporate defendants worked no injustice on

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* Plaintiffs, in effect, contend that $50,000 is not sufficient payment for nothing, because—so they claim—Fio Rito and Seeger received from Bruce even more for their worthless Coraloc shares. The fact is that Fio Rito's shares (including Seeger's) were bought by Bruce five months later to settle differences with Fio Rito unrelated to the purchase itself or to the value of the stock (81a). But plaintiffs could not show that they were damaged by the transaction even if it were assumed, for the sake of argument, that Bruce had agreed in advance to pay more for the shares of Fio Rito and Seeger.

** Coraloc is apparently a nominal defendant and since it was a subsidiary of Bruce, Bruce and Coraloc are treated in this context as one.

*** There is authority that the release of a defendant who is an alleged joint tort feasor operates to release all defendants.

plaintiffs. The ultimate failure of the claim against the corporate defendants for lack of proof of damage is a foregone conclusion. Certainly, the plaintiffs have not made the requisite showing of a reasonable expectation of success.

CONCLUSION

The case does not merit review by this Court and the petition should be denied.

Respectfully submitted,

DONALD J. COHN,
Counsel for Respondents
E. L. Bruce Co., Incorporated
and Coraloc Industries, Inc.

THOMAS FIELD,
PETER S. HELLER,
Of Counsel.